BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CRYSTAL LATURNER	)	
Claimant	)	
	)	
VS.	)	
	)	
QUAKER HILL NURSING, LLC.	)	
Respondent	)	Docket No. **1,059,381**
	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the June 11, 2012 preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Kim R. Martens, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the June 4, 2012, preliminary hearing transcript, with exhibits; the February 21, 2012, deposition of Crystal Laturner, with exhibits; the May 14, 2012, deposition of Peggy Stanley, with exhibits; and all pleadings contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) found:

1) There was a causal connection between claimant's employment and her injury. Claimant was on the premises of the employer taking a smoking break and in the designated smoking area when the accident occurred. See *Hilyard v. Lohmann-Johnson Drilling Co.*, 168 Kan. 177, 211 P.2d 89 (1949) and K.S.A. 44-508(B) K.S.A. 2011 Supp [sic](Coming and going rule does not apply.)[1]

2) There was no reckless violation of employer safety rules. The claimant slipped on the ice on the patio.

[1] The so-called "going and coming rule" contained in K.S.A. 2011 Supp. 44-508(f)(3)(B) is not an issue.

3) The accident was the prevailing factor causing the injury, medical condition and disability.[2]

Respondent raises a number of issues which fall under the general heading of "arising out of and in the course of the employment." Respondent also maintains that this claim should be denied because the injury arose out of claimant's reckless violation of respondent's safety rules and regulations. Respondent requests that the ALJ's Order be reversed and all compensation denied.

Claimant argues the ALJ's Order for Compensation should be affirmed.

The specific issues to be reviewed are:

(1) Whether claimant's accidental injury arose out of and in the course of her employment.

(a) whether there was a causal connection between the conditions under which claimant's work was required to be performed and the resulting accident.

(b) whether claimant's injury occurred as a result of the normal activities of day-to-day living.

(c) whether claimant's accident or injury arose out of a neutral risk with no particular employment or personal character.

(d) whether claimant's injury is non-compensable under the "recreational or social events" provisions of K.S.A. 2011 Supp. 44-508(f)(3)(C).

(e) whether claimant's accident was the prevailing factor causing claimant's injury, medical condition, and resulting disability or impairment.

(2) Whether claimant's injury resulted from her reckless violation of respondent's workplace safety rules or regulations.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

[2] ALJ Order (Jun. 11, 2012) at 1.

Crystal LaTurner was age 34 when she testified at the June 4, 2012 preliminary hearing. She started working as a housekeeper at respondent's Quaker Hill skilled nursing care facility in Baxter Springs, Kansas, on June 8, 2011. Claimant's job duties required her to clean various areas inside the facility, including entrance ways, the self-serve café, bathrooms, shower rooms and patient rooms. She worked approximately 30 hours a week. On the date of injury claimant commenced work at 7 a.m. and her shift ended at 3 p.m. She was allowed two breaks per day and also a lunch break. For lunch break, claimant was required to clock out. The lunch break was for one hour during which claimant was free to either leave respondent's premises or to spend her lunch break at the facility. Claimant was a cigarette smoker. Respondent had designated a patio area outside the building where employees were allowed to smoke at lunch and on break.

On January 12, 2012, claimant was on lunch break, which began at 10 a.m. Since she had clocked out she was not being paid at the time of her accident. She ate lunch in the break room inside respondent's facility. After she finished eating, while still on her lunch break, claimant felt the urge to smoke a cigarette. She stepped out of the door which led to the patio. The patio was covered with ice and snow. Claimant slipped and fell, sustaining injury to her lumbar spine. Claimant testified the guttering above the door out of which she stepped was leaking water onto the patio. Claimant believed the leaking water increased the slippery condition of the patio. Apparently, there had been no effort to clear the ice and snow from the patio before claimant fell. Claimant testified she did not leave respondent's premises during her shift on the date of the accident, nor did she intend to do so. Claimant's last day of work for respondent was January 16, 2012.

As one would expect, respondent did not allow smoking in the building. There was no evidence that respondent encouraged claimant to smoke. There was no evidence respondent specifically asked claimant on the date of accident to smoke, either on the designated smoking patio or elsewhere. However, respondent's policy was that employees who smoked were required to do so only on the designated patio. There is no evidence that on the date of accident respondent prohibited either claimant or any other employee from smoking on the patio area because of the icy conditions or for any other reason. Claimant had no purpose in exiting the building to the patio area on the date of accident other than to smoke and to perhaps socialize with other employees who might have been present.[3] She had no work- related reason to leave the building when she did so. There is no evidence that respondent warned claimant about the condition of the patio. Claimant was aware of the patio's icy condition because she walked across it prior to her entering the building at 7 a.m.

It was not claimant's responsibility to apply sand or chemicals on the slippery patio area. Instead, Ryan Livingston, respondent's maintenance man, had the duty to put down

[3] Only one person, a co-employee of claimant's, was present on the patio when claimant was injured.

ice melt when needed. There is no dispute that the designated smoking area was located on respondent's premises and was under respondent's control.

Peggy Stanley was employed as the corporate safety director for Americare Systems, Inc. (Americare). Americare owned skilled nursing facilities and assisted living facilities in Kansas and other states, including the Quaker Hill facility. Her job required her to oversee issues involving safety, workers compensation, OSHA, records requests, Family and Medical Leave Act, EEOC, HIPAA and ADA throughout Americare. Ms. Stanley was involved in developing and implementing safety training, the goal of which was to prevent accidents. Claimant was exposed to such safety training prior to the accident. Some of that training directly dealt with preventing slips and falls. However, Ms. Stanley testified that claimant did not violate respondent's safety policies by walking out the door of the building to the designated smoking area. Nor did claimant violate any safety policy by slipping on the ice and falling.

The only medical evidence admitted into evidence at the preliminary hearing consisted of two reports authored by orthopedic surgeon Edward J. Prostic, M.D. In Dr. Prostic's opinion:

> On or about January 12, 2012, Crystal G. LaTurner sustained injury to her low back during the course of her employment. Clinically, she has a predominantly central herniation of disc at L4-5. She needs to continue at modified activities with maximal lifting of 25 pounds occasionally knee-to-chest and half that much frequently. She needs to be able to change position for comfort. The work-related accident of January 12, 2012 is the prevailing factor in her injury and need for treatment.[4]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(b) and (c) provide:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) provides:

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[4] P.H. Trans., Cl. Ex. 1 at 2.

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(f) provides:

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(C) The words, 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

K.S.A. 2011 Supp. 44-508(g):

> 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-501(a)(1) provides in pertinent part:

> Compensation for an injury shall be disallowed if such injury to the employee results from:
>
> . . .
>
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations.

ANALYSIS

The undersigned Board member finds that the ALJ's preliminary hearing Order for Compensation should be reversed. The Board has jurisdiction to review the issues raised by respondent pursuant to K.S.A. 2011 Supp. 44-534a(a)(2).

Under K.S.A. 44-508(f)(2)(B)(I), an injury by accident shall be deemed to arise out of employment only if there is a causal connection between the conditions under which the work is required to be performed and the resulting accident. This provision, enacted as part of the extensive amendments to the Act effective on May 15, 2011, arguably embodies prior case law. For example:

> In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[5]

K.S.A.. 44-508(f)(3)(A)(ii), also part of the 2011 amendments, provides that the words "arising out of and in the course of employment" shall not be construed to include an accident or injury which arose out of a neutral risk with no particular employment or personal character. This provision represents a departure from a number of appellate decisions which conclude that neutral risks may be compensable. For example, in

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[5] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

Hensley[6] the Kansas Supreme Court established three general categories of workplace risks: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. The risks in the first category are universally compensable. The risks falling in the second category do not arise out of employment and are not compensable. Under the third category, compensability depends on the facts surrounding the injury.

The undersigned Board member finds that claimant did not sustain her burden to prove that her accidental injury arose out of her employment with respondent. Specifically, the preponderance of the evidence does not demonstrate that the risk associated with claimant's accident and injury was one distinctly associated with claimant's employment. Nor has claimant sustained her burden to prove that there was a causal connection between the conditions under which the work was required to be performed and the resulting injury.

Claimant admitted that she had no work-related purpose in exiting respondent's building to the patio area. Claimant's action in proceeding to the designated smoking area resulted from no requirement or incident of her job, but rather was related to her desire to smoke. Claimant's urge to smoke caused her to walk onto the patio area and that desire did not arise out of the nature, conditions, obligations, or incidents of her employment. Instead, the risk of injury arose out of, at best, a neutral risk. The risk out of which claimant's accident and injury arose was her status as a smoker, a risk which is clearly not distinctly associated with claimant's work. Nor was slipping and falling on ice and snow shown to be a risk associated with claimant's employment.

Moreover, the evidence does not prove the requisite causal connection between the conditions under which the work was required to be performed and the resulting accident. Respondent prohibited smoking in its facility, a policy which very likely was legally mandated. As a convenience to its employees who used tobacco, respondent designated an area outside the building where employees could indulge their habits. However, respondent's actions did not encourage employees to smoke. Nor was claimant obliged to smoke during her shift. Nothing whatsoever about claimant's job duties required her presence on the patio on the date of her accident. On the contrary, claimant was free to leave respondent's property over her lunch hour.

Claimant's accident occurred on premises owned and controlled by respondent and some Board decisions distinguish those circumstances from those involving an accident

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[6] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P. 2d 641 (1979); see also *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P. 2d 168 (1980).

which occurred on premises owned and controlled by a lessor, not a lessee respondent.[7] However, the so-called premises exception relates to the going and coming rule, which is not at issue in this claim. Claimant was injured on a lunch break, not on a short break, and she had clocked out when the accident occurred. Board decisions make a distinction between short breaks, such as rest or coffee breaks, and longer lunch breaks in which the employee is generally free to leave the employer's premises.[8] While breaks can benefit the employer and the employee,[9] exiting the building to smoke arguably benefitted neither. Smoking is not a "personal comfort" in the same sense as getting a drink, going to the restroom, or having a snack.

In his order, the ALJ cited *Hilyard*[10] to support the finding that there was a causal connection between claimant's employment and her injury. In that case, our Supreme Court affirmed a lower court judgement which determined that a compensable claim resulted from an injury sustained by an oil field worker. The employee was injured while working on his personal vehicle during a period when he was not actively performing his job duties. However, *Hilyard* is distinguishable from this claim. In *Hilyard*, claimant was expected to run errands for the employer with his personal vehicle whenever necessary. There is no such causal connection between work and the accident in this claim.

CONCLUSION

This Board member finds:

(1) Claimant did not sustain her burden to prove that her accidental injury arose out of her employment with respondent.

> (a) The evidence did not establish a causal connection between the conditions under which claimant's work was required to be performed and claimant's accident.

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[7] See *Curless v. Southern Education Council*, No. 233,051 1998 WL 847163 (WCAB Nov. 4, 1998) (Claim did not arise out of and in the course of employment when claimant injured in a common area outside a building in which respondent leased office space).

[8] See *Williams v. Allied Staffing*, No. 1,058,426 2012 WL 1142973 (WCAB March 2012) (Claim arose out of and in the course of employment when claimant injured on a 30-minute, off-the-clock lunch break while walking to designated smoking area next to respondent's building); *Wallace v. Sitel of North America*, No. 242,034 1996 WL 1008023 (WCAB Oct. 28, 1999) (Claim did not arise out of and in the course of employment when injury occurred in designated smoking area outside building while claimant on a "quite short" cigarette break).

[9] See *Riley v. Graphic Systems, Inc.*, No. 237,773 1998 WL 921346 (WCAB Dec. 31, 1998) (Claim arose out of and in the course of employment when claimant injured while exiting breakroom).

[10] *Hilyard v. Lohmann-Johnson Drilling Co.*, 168 Kan. 177, 211 P.2d 89 (1949).

(b) Claimant's accidental injury arose out of a neutral risk or a personal risk not associated with claimant's employment.

(2) Given findings (1)(a) and (b), the other issues raised by respondent will not be addressed at this point in the claim.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, the undersigned Board Member finds that the June 11, 2012 preliminary hearing Order for Compensation entered by ALJ Brad E. Avery should be and hereby is reversed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge

[11] K.S.A. 44-534a.

[12] K.S.A. 2011 Supp. 44-555c(k).